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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY MS
DEPUTY

No. 56294-4-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,
RESPONDENT

V.

ZACKERY CHRISTOPHER TORRENCE,
PETITIONER.

REPLY TO RESPONDENTS RESPONSE TO
PERSONAL RESTRAINT PETITION
PURSUANT RAP 16.10(a)(2)

Petitioner Pro Se
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REPLY ARGUMENT

The primary question in Torrence's case is whether his convictions must be reversed in light of prosecutorial misconduct.

While the prosecutor is entitled to draw the jury's attention to admitted evidence. In this case the "Illustrative Pre-Pubertal Female Genitalia" served no legitimate purpose. The prejudicial effect could not have been cured by a timely objection and this court should not conclude with any confidence that Torrence's convictions were the result of a fair trial. Consistent with both long standing precedent and the holding in *In Re Personal Restraint of Glassman*, 175 Wn.2d 696, 286 P.3d 673 (2012).

Here, petitioner respectfully disagrees with the response given by the state. The record reflects something quite different than the state persuades this court to believe. With further elaboration this court should find dismissing this motion is not appropriate. The correct remedy is review and remand.

Prejudice in this case is first found through the dialogue of Dr. Copeland's testimony and the visual aid reference the state introduced during trial.

While the state presented in their response to this motion a key bit of information. (notice of expert testimony by Dr. Kim Copeland) See states App.B Provided in the states notice of their expert witness testimony they declared with specifics the details and scope of testimony: [(1) the anatomy of the female external genital organ including the fact that it is possible for penile-vaginal sexual intercourse to occur between an adult male and an eleven year old female; (2) the fact that medical professionals rarely observe physical injury or physical signs from past sexual abuse of minor children and adolescents during medical examinations of the genitalia, vagina

and/or anus; (3) statistics about this fact; and (4) the medical reasons for this fact. Dr. Copeland may rely on and testify about the following articles and/or studies.]

Here it was clear and concise that Dr. Copeland's testimony may articulate facts regarding data on the female "external genital organ", as declared in the states notice. Although nothing in the notice gave mention to the illustrative presentation of what is factually known as "gentle labial traction". The illustration shows gloved hands literally moving the outer layers of the labia out of the way to be able to see the next couple layers of structures that are present there. RP Pg.874 ¶ 11-14, see appendix for illustration.

The state wants to sugarcoat the illustration and testimony as "textbook" and the average juror would not be overcome with emotion.

The state is wrong in assuming the jurors would not be overcome with emotion, passion and prejudice. Viewing the exam of a pre-adolescent female in conjunction with the barrage of mental notes from the prosecutions questions. All examples or analogies of damaging the structures, potential bleeding, pain and possible numbness.

The state in this case negotiated on record they would not break the rules to obtain a guilty verdict. RP Pg.117 ¶ 10-12. Also agreed that "the state may not use prejudicial or inflammatory language to characterize the alleged acts of Mr. Torrence either in questioning a witness argument to the court or in the presence of the jury in opening statements or closing". RP Pg.121 ¶ 7-11.

The state also made this compelling statement : "I'm not going to use things that would appeal to the passions of the jury if that would be

prohibited. I don't even know what inflammatory language means so I'm not quite sure how to respond to that". RP Pg.121 ¶ 15-18. The judge then quoted: "You're not sure how to respond to that?" RP Pg.121 ¶ 19. The judge goes on to enter in the record the parameters and scope of the prosecutors argument, quoting: "okay, all right. so I'm granting nine as to appealing to the emotions of the jury. So the case law would indicate that the prosecutor has to avoid appealing to the passions and emotions of the jury in-his questioning and in his argument."

Sub (10)- state may not use examples or analogies of any arguments that tend to trivialize the burdens-states burden of proof any objection to that Mr. Hayes?

Following this entry a great dispute took place over the state's introducing Dr. Copeland to the stand. Because no exam was conducted on the alleged victim in this case, the relevancy of testimony regarding an exam was not relevant.

Torrence's attorney did essentially object to the entirety of the states introduction of Dr. Copeland's testimony. See RP Pg.122-128. He noted that nobody examined the victim, so how could any of the states presentation be relevant. Also stating that, "had we looked we likely wouldn't have found anything anyway's is not probative of whether or not the crimes occurred at all.

This case's record does provide great clarity on the states willingness to adhere to the rules, and yet they did not. When the judge declared the state may not use examples or analogies of any arguments that tend to trivialize the burdens-states burden of proof. RP Pg.122 ¶ 10-12

The state failed to adhere to this agreement, thus inflaming passions and prejudice through the juries emotional rapid response. The testimony of

Dr. Copeland in conjunction with the highly prejudicial visual internal genital exam being performed, was reversible error.

The Glassman case provided the courts with some compelling material provided by; Lucille A. Jewel, in her "Through a Glass Darkly: using brain science and visual rhetoric to gain a professional perspective on visual advocacy". *Glassman*, 175 Wn.2d 696, 255 P.3d 673 (2012). Jewel established with scientific data the following:

[The processes involved with visual perception differ from how we apprehend logo-centric information. For instance, many perceptual processes are unconscious processes that do not interact with rational cognition. The non-rational aspects of visual processing lead to perceptual decisions that can be based on rapid reactions of fear or implicit bias, reactions that do not register within conscious perception.

Anytime a visual argument is raised, ethical and professional issues must be considered. What does it mean for professional advocacy when individuals sometimes do not see what is really there and reach erroneous snap judgments as to what they think they have seen?

The manipulation problem is best explained in the way the prosecution took advantage of the rapid cognition process individuals use to comprehend sensory information. e.g., Malcom Gladwell, *blink* 11-12 (2005)(explaining that humans have a decision making system that is capable of turning out decisions very quickly, so swiftly that we are not aware of the process); Joseph LeDoux, *The Emotional Brain* 165 (1996)(explaining that the rapid response processing of fearful sensory information is a survival mechanism that allowed us to react quickly to danger in the wild); Tom Stafford & Matt Webb, *Mind Hacks* 124-25 (2005).

And the unconscious emotional reactions people have when they see

gruesome images. See e.g., Kevin S. Douglas, David R. Lyon and James R.P. Ogloff, The impact of graphic photographic evidence on mock jurors decisions in a murder trial: Probative or prejudicial?, 21 L. & Hum. Behav. 485, 492 (1997)

The conceptual principles we use to organize images in our mind are often a stronger influence than the contents of the images themselves (which would rely on rational logic). See, Steven Pinker, how the mind works 8 (1997); Zenon W. Pylyshyn, seeing and visualizing it's not what you think 5 (2003).

In terms of the persuasive influence unconscious stimuli can have on our emotions, the scientific research supports the broad conclusion that our "emotions are more easily influenced when we are not aware that the influence is occurring. See Ledoux supra at 59.

Because we process sensory information rapidly and unconsciously, in a way that we cannot cognitively comprehend or analyze with logic. Sometimes, we are unable to rationally consider how images affect our emotions or our decision making process. As we are processing an image in our pre-conscious sensory system, that image can activate an emotional reaction in our mind without us even knowing about it. We might reach a decision on it's substantive meaning in a mere split second and that decision might be the product of unconscious bias.] See Jewel, Through a Glass Darkly, Pg 36-37 note, 219,220,221.

In this case the state wants this court to believe it would "insult the sensibilities and intelligence of jurors". Response Pg.14 ¶ 4-6. This notion merely alludes to the fact we have emotionless jurors, robotic in nature. That is absurd, we've yet to reach that moment in time. Never the less the record provides this court the issue prosecutorial misconduct with multiple

instances. Where the prosecution has failed to adhere to the rules, even agreeing they didn't understand them at one point. RP Pg.121 ¶ 15-18

The courts have held the cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions could erase their combined prejudicial effect. **State V. Cook**, 17 Wn.App 2d 96 (April 6, 2021) quoting Lindsay, 180 Wn.2d at 443; In Re Pers. Restraint of Glassman, 175 Wn.2d 696, 707, 286 P.3d 673 (2012)(plurality opinion) of Cook's claim of prosecutorial misconduct whether his trial counsel objected to the misconduct or not.

While Torrence may have brought forth one alarming and prejudicial moment of prosecutorial misconduct. Being irrelevant illustrative evidence used in conjunction with Dr. Copeland's testimony.

Delving into the record has revealed more than just one instance. for example when the state failed to understand what "inflammatory language means". The judge outlined in detail the state was not allowed to use examples or analogies of any argument that tends to trivialize the burdens-states burdens of proof. RP Pg.122 ¶ 10-12.

Certainly the use of Dr. Copeland and the introduction of the visual vaginal exam. Became an "example" unsupported by any relevant evidence. Although it was used as a guise it was clearly an analogy which presented that had the victim received an exam "maybe" nothing would indicate intercourse happened, or trauma.

This was a blatant disregard for the law and the agreement upon the judges request. "A" fair trial certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office and the expression of his own belief of guilt into the scales against the accused". **State V. Monday**, 171 Wn.2d 667, 677, 257 P.3d 551 (2011)

quoting *State V. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *State V. Reed*, 102 Wn.2d 140, 145-47, 684, P.2d 699 (1984).

Here, Torrence does present this court with enough facts within the record, relevant case law and scientific studies and data. All compelling this court to review the claim of prosecutorial misconduct.

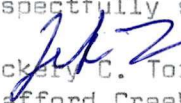
CONCLUSION

Petitioner respectfully disagrees with the states response. Has presented this court with how the prosecution has undermined the petitioners presumption of innocence, discussed facts not supported or relevant by the evidence and triggered passions or bias of the jury.

For the above mentioned reasons, relevant case law and scientific studies and data. The issue in this case deserves review and the remedy should be remand.

Dated this 25th day of January, 2022.

Respectfully submitted by


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DECLARATION OF SERVICE BY MAIL
GR 3.1

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STATE OF WASHINGTON
BY DEPUTY 35

I, Zachery C. Torrence, declare and say:

That on the 25 day of January, 2022 I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 50294-4-II:

Reply to states Response to P.2.9

addressed to the following:

Washington State Court
of Appeals Division Two
909 A Street
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Tacoma WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 25 day of January, 2021, in the City of Aberdeen, County of Grays Harbor, State of Washington.

[Signature]
Signature
Zach Torrence
Print Name

DOC 355318 UNIT H14-911
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